Supreme Court, U.S.
FILED

94 556 SEP 26 1994

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CASE NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PLAINTIFF/PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; SAN DIEGO ELECTRICAL PENSION TRUST; SAN DIEGO NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK; RON COOPER; JOE MANSOLILLO, et al.; FISCHBACH & MOORE, INC.,

DEFENDANTS/RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can an appeals court misrepresent the facts (by holding that Plaintiff "voluntarily dismissed" his case) and the law (by holding that it lacked jurisdiction over an appeal from a "final order" because Plaintiff didn't appeal from an "interlocutory order") to dismiss an appeal on grounds it lacked jurisdiction, and at the same time exercise jurisdiction in order to remand the case for an award of attorneys fees against Plaintiff for acts in the district court (which protected Defendants by dismissing three complaints and demanding a $200,000.00 bond be posted before Plaintiff could proceed with a suit under federal remedial statutes)?

LIST OF ALL PARTIES

Plaintiff Lawrence Moore, and Defendants International Brotherhood of Electrical Workers Local 569, International Brotherhood of Electrical Workers, J.J. Barry, S.R. McCann, Dick Robbins, San Diego Electrical Pension Trust, San Diego Electrical Health and Welfare Trust, San Diego Electrical Industry Education and Manpower Development Trust, Labor Management Cooperative Fund, San Diego National Electrical Contractors Association, Fischbach & Moore, Inc., Tom Pridemore, Paul Blackwood, Wayne Lovin, Jim Westfall, Wilmer Bass, Dick Smith, Terry Godshalk, Joe Heisler, George England, Ray Altmeyer, John Simpson, Jim Aylsworth, Charles Wilder, Joe Mansolillo, Ron Cooper, Dave Allison, Ken Stuart, Dave Raspolich, Wayne Van Der Linden, Jack Zwart, Mike Sparks.

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The Appeals Court had jurisdiction over the appeal from a final order, and its decision to dismiss for lack of jurisdiction, while at the same time exercising jurisdiction for the sole purpose of making an award of attorneys fees against a Plaintiff suing under three federal remedial statutes, conflicts with decisions of the Supreme Court and begs for exercise of this Court's powers of supervision.

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There were no opinions published below.

STATEMENT OF JURISDICTIONAL GROUNDS

The memorandum of the court of appeals was filed on June 27, 1994. Jurisdiction was proper in the district court under 28 U.S.C. §§ 1331, 1337, 1343, 29 U.S.C. § 412, and 29 U.S. C. § 1132, *et seq*. Appellate jurisdiction was proper under 28 U.S.C. § 1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. § 1254(1) and Supreme Court Rule 10.

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STATEMENT OF THE CASE

This case grew out of district court Case No. 87-0172-B where Plaintiff Lawrence Moore won jury verdicts against Union Defendants, but the district court refused to award injunctive relief from Union officers violating his rights and assaulting him, or to exercise ancillary jurisdiction to modify their pensions which the jury held were inflated with Union money.1/

Mr. Moore's prayers for declaratory relief were not given to the jury as prayed for, and the court decided he was not entitled to equal space in the Union newsletter to respond to the ongoing personal attacks by officers (which, of course, gave them a free hand to continue using Union facilities to campaign against Moore).

Ten days after Moore won jury verdicts in

1/. A Petition for Writ of Certiorari to the Ninth Circuit from that case was filed with the Supreme Court on September 7, 1994 for review of Ninth Circuit affirmation of district court refusal to order officers to return Union money stolen for inflated pensions and attorneys fees for their losing defense (the jury found they breached their LMRDA § 501 fiduciary duties by taking the Union funds for inflated pensions).

Case No. 87-0172-B, Local 569 business manager Pridemore began castigating him in Local 569's newsletter and mailing other similar letters to Union members. Moore was reinstated to Union membership by order of the court after the jury found he was wrongfully expelled in March, 1990 for suing Blackwood, Pridemore and Westfall and winning (in Case No. 85-1719-B).

At the first Union meeting Moore attended, on October 8, 1991 he was threatened, assaulted and vilified by Defendants Hartnett (who stated he was acting for Pridemore), Simpson and Union goon Gary Degener, and a letter from Carl Burns containing overt threats was read to members.

Moore filed this case on October 28, 1991, but did not serve the Complaint because motions JNOV had not been heard and the court still had not decided how to dispense with his injunctive and declaratory relief prayers.2/

2/. Moore moved for a new trial against Union goon Degener and Union Trial Boards (which had included Hartnett and Simpson) which wrongfully fined and suspended him, after the jury awarded punitive damages but no compensatory damages.

When Moore attended other meetings Pridemore verbally attacked him from the officers' podium and encouraged further attacks by others and by Aylsworth and Training Trust Trustee Basore.3/

After it became clear that no injunctive or declaratory relief was forthcoming he filed and served an Amended Complaint containing causes of action: (1) against Local 569, Pridemore, Heisler, Hartnett and Simpson for violating his rights and illegal discipline by inflammatory comments in the official Union newspaper and a letter mailed to all Union members, by reading a letter to members at a Union meeting which contained threats of violence, by objecting to Moore attending that Union meeting, by stating he was not a Union member and was present only because "some judge" ordered it, by encouraging

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3/. In Case No. 87-0172-B Moore prayed for an injunction against ongoing violations of rights protected by LMRDA § 101 (29 U.S.C. 411), and intimidation, threats, assault, battery, fines, suspensions and expulsions from the Union. He also prayed for declaratory relief from Union Defendants exercising jurisdiction over state criminal and tort actions (after assaults and batteries on Moore, Defendants then charged him with assault before the Union Trial Boards).

Union goon Degener to assault him, by denying him equal rights to speak at the meeting and by shouting him down when he did speak;

(2) against Local 569 and business managers Pridemore, Smith and Blackwood for breaching a duty of fair representation ("DFR") to fairly administer the collective bargaining agreement ("CBA") by permitting Fischbach & Moore, Inc. ("Fischbach") to pay inflated pension credit-hours into Smith's Pension Trust account, and against Pridemore and Degener for colluding to derogate Moore's job referral status;

(3) against Fischbach for breach of the CBA contract provision limiting payments into Trust accounts to one credit-hour per hour worked;

(4) against Defendants Pridemore, Heisler, Smith, Archer, and Webb for breaching fiduciary duties by taking union funds to buy inflated pensions for Archer and Webb (the court refused to permit Moore to add them to the same cause of action in Case No. 87-0172-B);

(5) against the same 21 union officers and agents -- found to have breached LMRDA § 501

(29 USC 501) fiduciary duties to Local 569 in Case No. 87-0172-B -- for breaching fiduciary duties under ERISA (29 USC 1132), after Moore discovered they had also appointed themselves Trustees and directors of Local 569's Pension Trust, Health & Welfare Trust and Apprentice Training Trust, and as Trustees received their own stolen Union funds and permitted their own personal Pension Trust accounts to be inflated at the rate of 2500 credit-hours per year;4/

(6) against now Training Trust director

4/. All of Local 569's Trusts were established pursuant to CBA provisions to provide benefits only for hourly paid employees. Employees vote on an amount to be deducted from hourly pay and paid into the tax-exempt Trusts at the rate of one credit-hour for each hour worked. Officers were not even covered by the CBA or entitled to receive 40 pension credit-hours per week where the salaried rate favored them over hourly paid electricians. *Donovan v. Daugherty*, 550 F.Supp 390 (D.C. Ala. 1982). Smith was nominally an hourly-paid Fischbach supervisor, but in fact regularly received pay for time not worked and vacation and severance pay, which included huge payments of credit-hours into his personal Pension Trust account. Payments of ancillary benefits into ERISA Trusts are prohibited. *Cf. Sutton v. Wierton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983). ERISA Trusts must be established and maintained pursuant to written instruments. *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986).

Westfall (who breached his fiduciary duties as an officer by taking Union money for inflated pensions) for taking Training Trust funds for inflated pensions, for allowing Union officers who were Training and Pension Trust Trustees to campaign for Union office and pass out absentee ballot requests and ballots in Training Trust classrooms, and for endorsing political allies for union office and distributing documents defaming Moore (excluded from classrooms);

(7) against Trustees for causing a pattern of losing investments of participants' funds, and incurring inordinate administrative costs;

(8) against administrators who refused to give Moore copies of the annual Trust reports or to let him inspect them on the premises;

(9) against San Diego National Electrical Contractors Association ("NECA") manager Joe Mansolillo (who appointed himself and all other management Trustees on Union Trusts and Funds) for taking $18 Million of Pension Trust funds to his new position as a portfolio manager with an investing firm, despite no experience in the

investment field.5/

The two causes of action for violation of Moore's rights and illegal discipline under the Labor Management Reporting and Disclosure Act ("LMRDA") §§ 101 and 609 (29 U.S.C. 411, 529) were dismissed on April 6, 1992 without leave to amend by an order which held,

> "This court cannot police the speech that takes place or is not allowed at Union meetings. There are no allegations that the defendants' speech was defamatory and or unprotected by the First Amendment."

5/. Union Trustees Blackwood, Pridemore and England abused the Training Trust to discipline dissident Union members, losing a $million legal battle and control of the Trusts to Mansolillo, who fancied himself a player in the real estate and Savings & Loan industries, losing $Millions of Pension Trust money. The Pension Trust had also financed and refinanced the Training Trust (transactions between such parties-in-interest are prohibited by ERISA but exemptions can be approved by the U.S. Department of Labor after notice to participants). A second refinancing was denied by the DOL on grounds the Training Trust had no equity in its facilities, but the Trustees then got an independent equity survey showing necessary equity and re-applied to the DOL which then approved the exemption. Records obtained from the DOL showed that "independent" equity survey was done by Mansolillo in his new role as "manager" for an investing firm. Trust records showed several prohibited transactions between parties-in-interest where no exemptions had been applied for and participants had never been notified of any requests for exemptions.

Appendix, pp. 61-64 (the court said officers' threats were "freedom of speech that's being exercised by the people at these meetings."

An LMRDA breach of fiduciary duty claim against Union officers who took Union funds for Archer's and Webb's pension was dismissed, and Moore had thirty days to amend that claim and the Seventh and Eighth ERISA Causes of Action.

A claim of emotional distress from assaults and violations of his rights was dismissed as preempted by ERISA (it was not related to ERISA claims), as were his demand for a trial by jury and prayer for punitive damages.6/

The claim against Fischbach for inflating

6/. Allegations of willful and malicious acts permit punitive damages under ERISA, and right to a jury trial depends on how relief prayers are characterized (there is no right to a jury trial under ERISA if only equitable relief is requested). *Teamsters Local 391 v. Terry*, 110 S. Ct. 1339 (1990) (cited by the court).

Where, as here, issues common to both legal and equitable claims are to be tried together, the jury's findings on the legal claims will be binding on subsequent trial of the equitable claim. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976), *aff'd*, 433 U.S. 36, 97 S.Ct 2549, 53 L.Ed. 2d 568 (1977).

Smith's Pension Trust account before he was a Union officer was dismissed without leave to amend as barred by the statute of limitations and because Moore had no standing to sue under Labor Management Relations Act ("LMRA") § 302 (29 U.S.C. 186) (but he was suing under § 301). Moore argued that Fischbach's supervisors were going to get distorted pensions from the common fund, but the court said, "There's no cause of action stated nor can one be stated."

An amended order filed two weeks later also dismissed Fischbach *nunc pro tunc* from the two ERISA clauses of action by finding,

> "Although it is named as a defendant in the Seventh and Eight Causes of Action, which allege Breach of Trust Agreement and Breach of Fiduciary Duty, Plaintiff cannot state a cause of action against Fischbach & Moore since it was an employer with no fiduciary duty to the Union" (sic).

Appendix, at p. 68. Those two causes of action were under ERISA and Fischbach's fiduciary duty at issue was to Trust participants. The court disingenuously obfuscated the facts and the law to protect Fischbach from *bona fide* claims (but See ERISA § 3, at Appendix, p. 46, which shows

clearly that Fischbach was a proper party).7/

A Second Amended Complaint filed on May 20, 1992 contained a First Cause of Action against Archer and Webb under LMRDA § 501, and a Second Cause of Action under both ERISA and the LMRA against the Trusts and Funds Defendants which had Seven Counts.

Count One was against all other Defendants for breach of Trust Agreements and fiduciary duties under ERISA by their discriminatory and collusive self-dealing.

Moore alleged money paid into ERISA Trusts and Funds was not held solely for the purpose of paying for pensions or medical and hospital

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7/. It wasn't the first time Fischbach had orders reviewed without filing documents. In Case No. 87-0172-B a ruling of law that it and a puppet corporation were separate was changed by a similar *nunc pro tunc* order to hold there were questions of "fact" whether Fischbach and a separate puppet corporation were one entity.

Defendants were all proper parties as per ERISA, Title I § 3 (ERISA also provides for a remedy against nonfiduciaries for prohibited transactions). A Trustee bears an unwavering duty of complete loyalty to Trust beneficiaries to the exclusion of the interests of all other parties, and "dual loyalties" are expressly prohibited *NLRB v. Amax*, 453 U.S. 322 (1981).

care, or to defray administrative costs, or for the costs of apprenticeship or other training programs pursuant to LMRA Sec. 302(c), that the fiduciaries received consideration in their own personal ERISA Trust accounts from parties in interest and Trusts and Funds themselves, that Trustees, administrators and directors abused assets of the Trusts and Funds for their own Union political agenda despite the conflict of interest created by their dual roles, that the Defendants colluded to appoint only Union and NECA officers and agents to Trustee positions on the Trusts and Funds despite the conflict of interest created by their roles as Trustees of several Trusts, as employers and as Local 569 and NECA officers, that as administrators and directors they refused to produce requested information on the Trusts and Funds, and that exorbitant amounts of Trusts money were spent for separate law firms to separately represent Union Trustees and NECA Trustees because they did not relinquish their dual roles as officers of Local 569 or the contractors ass'n (NECA).

Count Two alleged various ERISA fiduciaries approved payments of improper pension credit-hours into their own individual Pension Trust accounts or those of co-fiduciaries (including Trusts administrators and directors), that they had not treated participants evenhandedly by permitting employer/fiduciaries and parties in interest to make improper payments into the favored participants' Pension Trust accounts, that they required a ten year vesting period for union participants while requiring only a five year vesting period for salaried non-union employees (causing breaks in service and losses of benefits for seasonal construction workers thereby wrongfully creating a favored class of participants), that they used their dual roles as NECA and Union officers (who administrate the CBA job referral procedure) to ensure, as proved in Cases Nos. 85-1719-B and 87-0172-B, that Moore cannot work or participate in the Trusts, that Pension Trustee Mansolillo used Trusts assets in his own interests to become an investment manager in control of millions of

dollars of Pension Trust assets, and that his co-fiduciaries breached their fiduciary duties by permitting Mansolillo to commit the breach.

Count Three alleged that various Trusts Defendants had violated their fiduciary duties by approving full Health Trust benefits for co-fiduciaries (salaried non-union employees, and administrators and directors of the Trusts and other favored participants) despite payments of Health credit-hours into the Health Trust which were less than the CBA designated monthly, "for each hour worked," and that they also permitted Local 569 officers and agents to increase their reserve "banks" of Health Trust credit hours to the maximum bankable amount of 610 credit hours without any such payments into their accounts.

Count Four alleged various Trust Defendants colluded to appoint Local 569 agent Westfall as Training Trust "Director" despite no experience or education in the field, that they also used Training Trust funds and facilities to provide a political forum for their Local 569 political allies (who were also Training Trust Trustees)

and to distribute documents which defamed and impugned Moore's reputation, that they were influenced to breach their fiduciary duties by their political agenda in their dual roles as Union and NECA officers, that they used Trust funds to harass Trust participants who were their Union political opponents with lawsuits, that they convened Training Trust classes at Union meetings to influence votes on questions directly related to financing of jury verdicts against them in their role as Union officers, that Westfall and Bass had used Training Trust funds to buy inflated pensions in Local 569's Pension Trust, and that they had permitted co-fiduciaries, employers, non-participants, and co-Defendant San Diego Education and Manpower Development Trust (which no participants in any of Local 569's Trusts had any part in) to use Training Trust funds and facilities.

Count Five alleged that various Trusts Defendants breached their fiduciary duty and the LMRA by engaging the Trusts and Funds in prohibited agreements and transactions with

parties in interest, that they had improperly disposed of Pension Trust assets by financing, and re-financing, the Training Trust building, did not divest the Pension Trust of loans to finance the party in interest Training Trust's building, and did not compare Training Trust proposals at arms length to other investments, that both the Pension Trust and Health Trust continued to lease property from the Training Trust in violation of ERISA, that the Pension Trust financed construction projects for other parties in interest doing business with the Trusts, that fiduciaries gave no notice or any opportunity to present views to Pension Trust participants of intent to engage in such prohibited agreements and transactions with parties in interest, or of their intentions to apply to the U.S. Dept. of Labor for exemption from prohibited transactions, and that all such acts violated the LMRA and breached Defendants' fiduciary duties under ERISA.

Count Six alleged that Trusts Defendants permitted assets of the Trusts and Funds to

inure solely to the benefit of Trustees and employers (including Local 569 and the Trusts themselves) by creating sub-groups with shorter Pension Trust vesting periods and cheaper "flat rates" for Health Trust benefits, by permitting them to use Training Trust facilities disguised as an Education and Manpower Development Trust, by permitting employers to use Training Trust facilities for their businesses, and permitting non-participants to use Trust facilities.

Count Seven alleged that all Defendants committed fraud against participants of the Trusts and Funds by many of the circumstances stated above and by misrepresenting that Trust funds they had obtained were compensation for supposed expenses they incurred during so-called meetings or conventions of the Trusts.

Moore also asked for a declaratory judgment that would prevent Local 569 and NECA officers from appointing themselves as Trustees on the various Trusts and Funds, that the court remove those Trustees immediately as provided for by ERISA and that a person be appointed to serve

in their stead.

Defendants didn't answer the Second Amended Complaint, but again filed motions to dismiss. A hearing was scheduled for August 24, 1992.

In May, 1992 Moore, Defendants Pridemore, Smith and two others were nominated for Local 569 business manager. At a Union meeting on June 10, 1992 Pridemore and his appointed Union stewards distributed another Carl Burns letter which lied about Moore's national origin, that he falsified his electrician's qualifications and that he was an Income Tax protestor leader, together with a Union "grievance" which defamed Moore as a racist, a bigot, an avowed atheist, as devoid of morals, and for exercising his right to sue. The ostensible "grievance" came from a dossier secretly kept on Moore by now Training Trust director Westfall.

On June 18, 1992 Pridemore mailed all Union members another letter which enclosed a copy of the Burns letter (wherein Burns also portrayed himself as an agent of the Training Trust), and quoted the district court's statement about the

"certain abstention doctrine between the courts and the running of labor unions."

On June 27, 1992, as he stood on the steps of the Union Hall greeting Local 569 voters, Moore was assaulted and battered by Burns, who was in a group with Pridemore, Archer, Hartnett and others dressed in matching Union uniforms. Burns stole Moore's watch from his wrist during the physical attack.

On July 27, 1992 Moore moved to amend "to encompass wrongs done by the Union Defendants and others" following earlier dismissals.

Moore also moved to add a claim against Fischbach for moving on June 29, 1992 in Case No. 87-0172-B to ask the court to reconsider January, 1992 denial of $224,401.01 attorneys fees against him after it was dismissed from that action. Union and NECA Defendants had colluded to include a provision in their CBA provided for attorneys fees against a member who sued them. The court had held there that, "[the CBA]. . .specifically identifies [Moore] -- everything except by name."

Moore asked the court to reconsider earlier dismissals of Union Defendants in light of the recent violations of LMRDA §§ 101 and 609, the assaults, a battery and emotional distress. He also asked the court to reconsider its April 6, 1992 ruling that Fischbach had no duty as an employer to Pension Trust and CBA participants because ERISA clearly provided for a cause of action against such wrongdoing employers.

On August 24, 1992 Moore's motions to amend were denied. Defamation allegations were held to be futile, causes of action related to Burns' assault and battery were not permitted, and the claim against Fischbach under the LMRDA for interfering with Moore's right to sue was characterized as an attack on CBA § 1.06 and dismissed on *res judicata* grounds (there was no such cause of action against Fischbach in any prior action).

Moore's motions for reconsideration were denied on grounds he had not alleged any new facts or circumstances, and he was ordered to pay all Defendants' "attorneys' fees and costs

incurred in opposing the Motion" (Moore filed the motions within thirty (30) days of the new events as required by the Local Rules). All causes of action in the lawsuit were stayed until the costs and fees were paid in full and payment of attorneys fees was also a condition of proceeding with the unrelated LMRDA breach of fiduciary duty claim.

Defendants' motions to dismiss were all granted. Moore was given thirty days leave to amend the LMRDA § 501 breach of fiduciary duty claim, but Archer and Webb were dismissed. In explaining its bizarre decision the court held that only the Local Union was responsible for "transmitting" stolen money (Moore represented the Union in that claim against the wrongdoing officers who took that money). But after Moore protested the court said the Union president and financial secretary (dismissed on April 6, 1992) "would cause those payments [to the Pension Trust] to be made, and they would be the ones. . . .who would have a personal liability to the Union itself." The court

correctly commented:

> "The Union is the victim....That trust fund is sort of an incidental beneficiary....the cause of action is against those in the Union who caused the inappropriate transfers to be made, and it would seem to me that if the Union doesn't wish to keep litigating against members of the Union, a simple way to stop it is to simply reverse those entries and get the money back into the general fund and loop this cause of action all together."

Moore was given 30 days to amend to name the officers dismissed on April 6, 1992 and it became obvious the court would do whatever was necessary to stop the case from proceeding.

At the hearing the court said his claims "against the trust are totally conclusory and ambiguous and incomprehensible," and "fails to state facts sufficient against any trust and against any trustee," and stated its intent to have Moore post a $200,000.00 bond, "to protect the Defendants from attorneys fees and costs against the trust or the directors or any of the Defendants other than the Local Union, as to whom the Plaintiff states a cause of action. . .before there will be any further proceedings

under this case against . . . Union trusts and directors" and "there will be no further action taken in this case until the Plaintiff pays attorneys fees and costs which the court is awarding out of the Plaintiff's motion for reconsideration."

Besides the attorneys fees and costs conditions on proceeding with the action, the district court also stayed the lawsuit and all discovery "as to all Trusts and Trust directors on all causes of action . . . until plaintiff posts a $200,000.00 cash or corporate surety bond to be used to pay defendants' attorneys' fees in the event that plaintiff does not prevail in his claims against the Trusts and Trust directors and officers."8/

It was clear at the hearing that the court and Defendants understood perfectly the Second Amended Complaint and the motions to amend and reconsider. The court said that Union officers caused the lawsuit by not repaying stolen money after losing Case No. 87-0172-B, and they asked

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8/. See order at Appendix, pp. 69-74.

for a 60 day stay to decide whether to follow that course of action." The court then said,

> "Well, they've had a year. . . .I entered a declaratory relief judgment that the Union (sic) and its officers had violated their fiduciary obligation to the Union by transferring Union funds without proper appropriation."

The court stated its intent to hamstring Moore's suit by assessing attorneys fees and costs and by requiring a $200,000.00 bond,

> "Mr. Moore is going to have to pay costs and fees to the motion to reconsider. . . .it may require further hearings which may take a few days or weeks or months. . ..And furthermore, there will be no further action in this lawsuit even if those costs are paid. . .without the prior posting of a $200,000.00 bond. So it's possible that you're going to have enough time if you simply walk out of here and start doing what the Union should have done a year ago."9/

On October 28, 1992 Moore telephoned the

9/. Even in the Ninth Circuit, the propriety of a motion for leave to amend is generally determined by reference to several factors: (1) undue delay; (2) bad faith; (3) futility of amendment; (4) prejudice to the opposing party. *Hurn v. Retirement Fund Trust of Plumbing, Heating and Piping Industry*, 648 F.2d 1252, 1254 (9th Cir. 1981) (citation omitted). None of those factors were present in this action.

district court for permission to lodge a new Third Amended Complaint and was told he could not be advised as to such a lodging. Moore agreed to wait thirty days because twenty-one losing officers were still deciding whether to pay back money the jury in Case No. 87-0172-B held they stole (and modify inflated pensions).

On November 11, 1992 Moore attended a Union meeting where Pridemore read a letter to all members from Trust attorneys stating that as a result of the August 24, 1992 hearing Moore,

> "was thrown summarily out of court and. . . . definitely had his horse shot out from underneath him and is afoot in cavalry country."

Moore was then subjected to verbal attacks and intimidation by Union officers for suing them.

By November 30, 1992 the Union officers/ Trust trustees still had not decided to repay money stolen from the Union and to modify their inflated pension accounts, and Moore filed his 70 page Third Amended Complaint and moved alternatively for a final order.

The Complaint detailed with factual and legal specificity all causes of action against

the Union and Trusts defendants including new claims for civil conspiracy and fraud, and a breach of contract action against the IBEW and IBEW officers for not acting in good faith on Moore's internal Union charges against Local 569 officers for stealing Union funds to buy themselves the inflated pensions.

Other trustees were named who had become known to Moore (despite defendants' refusals to permit him to inspect Trusts' annual financial reports in violation of ERISA and a promise to the court to produce that information). Moore added employer-defendants to the ERISA causes of action for blacklisting him from employment to deny him Trusts benefits and named Union and Trusts' attorneys for breach of ERISA fiduciary duties by colluding with the Trustees and each other to cover up wrongdoing.

On December 1, 1992 the district court called Moore and said Fischbach had telephoned the court to protest filing and service of the Third Amended Complaint. He protested ongoing *ex parte* communications with Fischbach, but the

court said Defendants would not be required to answer the Third Amended Complaint. It called again that afternoon and asked Moore if he was going to pay the attorneys fees and post the $200,000.00 bond. When Moore indicated he was unable to pay any such fees or post such a bond (the court witnessed Defendants' blacklisting of Moore for years) he was asked to deliver to the court a declaration that he could not or would not pay such money. Moore did so and the action was dismissed on December 21, 1992.10/ He had tried unsuccessfully to get a complaint filed since October, 1991.

On January 15, 1993 the district court awarded $2,201.00 attorneys fees to Defendant Fischbach for opposing Moore's reconsideration motion and time spent at an ostensible court "hearing." No notice of any hearing was ever served on Moore or sent to him by any other method, or filed with the court or entered in the civil docket. He filed objections to the

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10/. See final order at Appendix, pp. 75-77.

order awarding fees to Fischbach and proved he never had notice of any hearing, and the court acknowledged Moore may not have had any notice and then referred the matter to the magistrate for a fees determination (Appendix, at 78, 81).

The magistrate determined Defendants were entitled to a total award of $1005.00 and left the matter of apportionment of that sum to them (Appendix, pp. 83-84).

The Defendants made an untimely "Motion for Reconsideration of Final Order" requesting the court to make dismissal with prejudice, but it was denied. Ironically, that reconsideration motion blatantly failed to conform to the Local Rules much more than Moore's reconsideration motion -- for which he was ostensibly being sanctioned -- but although Moore brought that point to the court's attention it was ignored.

Fischbach then requested "clarification" of the amount of fees awarded. The court reversed the magistrate (despite the fact Fischbach also did not notice Moore for any hearing it claimed fees for) and reinstated the amount of $2201.00

for Fischbach (Appendix, pp. 85).

Hearings on April 6, 1992 and August 24, 1992, showed the court was aware of the nature and intent of Moore's Complaints filed in this action. There were certainly no conclusory or vague allegations in a Third Amended Complaint filed on November 30, 1992.

The court dismissed the case on December 18, 1992, holding:

> Because plaintiff has stated that he is unable to post the necessary bond before this court is willing to permit plaintiff to pursue this lawsuit and because he has stated that he is unable to pay any amount of attorneys fees to defendants, plaintiff's ex parte application for a final order is granted and this case is dismissed in its entirety.

(See Appendix, pp. 75-77, at 77).

On appeal Moore argued: (1) that the district court had erred by dismissing the Union defendants from claims under LMRDA §§ 101 and 609 (dismissal was on grounds those claims had already been litigated in Case No. 87-0172-B and were therefore barred by *res judicata*) because the violations which were the subject matter of those claims in this suit occurred

after that case was tried and occurred because he won that case (the court refused prayers for injunctive relief specifically provided for under the LMRDA;11/

(2) that it was error to dismiss Fischbach from claims that it had breached the CBA (on grounds it had not breached the CBA by not adhering to contract limitations on payments of credit-hours into its supervisors' Pension Trust accounts and on grounds it could not be sued under ERISA) without leave to amend;

(3) that the district court erred by refusing to permit Moore to amend to add causes of action under the LMRDA against the Union for violating his right to sue, and for assaults

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11/. A motion to dismiss admits the well-pleaded material allegations of the complaint, *Hospital Bldg. Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Kugler v. Helfant*, 421 U.S. 125 n.5, 95 S.Ct. 1524 (1975), but denies their legal sufficiency. Consequently, the motion will not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

and batteries, and for conspiracy against NECA and Fischbach for agreeing with the Union to put a provision into the CBA which attempted to limit that right, and against those Defendants and Trusts Defendants and other employers for blacklisting him to interfere with his rights to pension benefits as an ERISA participant;12/ (4) that the court had abused its discretion by awarding fees on grounds motions to reconsider LMRDA claims against Union Defendants, and LMRA and ERISA claims against Fischbach, Union, NECA and Trusts Defendants, did not allege new facts

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12/. The district court held on August 24, 1992 that Moore should have sued Fischbach over the conspiracy to award attorneys fees against him in Case No. 87-0172-B (where a final order was entered on March 18, 1992), but when Moore then moved to amend to add the claim to that suit it assessed him attorneys fees again.

The court was an advocate for Fischbach in both cases and confirmed yet a third award of $224,140.01 attorneys fees for Fischbach made by colluding Union and NECA Defendants in Case No. 87-0172-B and this case acting as a joint Union-Management "committee." Union committee members were losing Defendants in Case No. 87-0172-B, and management member Raspolich was a supervisor for Dynalectric Inc. (convicted and debarred from Federal jobs with Fischbach in Georgia district court for bid-rigging, price-fixing and mail fraud).

and circumstances (Plaintiff had alleged very troubling new facts and circumstances which should have convinced the court that the Union Defendants had no intention of stopping their violations of Moore's rights, assaults and batteries without injunctive relief, and that expenditures of Union funds for attorneys fees and adverse judgments had no effect because officers merely dipped into the Union treasury. The violations increased in frequency after the court's April 6, 1992 ruling -- which Union officers mailed to all Union members).13/

13/. Dismissal of LMRDA § 101 and 609 claims caused increased attacks after April 6, 1992 and the court's comments were mailed to all Union members, and sent a message that Union officers now had a free hand to assault and batter Moore, which Carl Burns did at the Union Hall on June 27, 1992. The new violations of his rights and assaults and battery were the new facts and circumstances for Moore's request to the court to reconsider earlier dismissals. There were no grounds for awarding attorneys fees against Moore.

As shown above, new facts and circumstance were also the basis of a motion to reconsider dismissal of Fischbach. The court should not have awarded Fischbach attorneys fees in the amount of $2201.00 (part of the fees were for an unnoticed hearing). No record of any such motion or hearing appeared in the docket sheet.

(5) that it had erred by *sua sponte* refusing to require Defendants to answer the Third Amended Complaint because Defendants had no intention of voluntarily repaying money stolen from the Union or of modifying either inflated pensions of union officers or of Trusts and employers' salaried personnel.

(6) that it abused its discretion by requiring payment of attorneys fees and costs for seeking reconsideration of the unrelated LMRDA § 101 cause of action as a condition of going forward with the separate LMRDA § 501 claim for breach of fiduciary duty against Union officers.14/

(7) that there was no rational basis in fact or law for the court refusal to require Defendants to answer the Third Amended Complaint filed on

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14/. That LMRDA § 501 cause of action became necessary because the court refused to permit Moore to amend at trial in Case No. 87-0172-B to add the newly discovered Union officers to the same cause of action there.

Defendant Stuart (Pension and Health Trust Director) submitted a Declaration there that 52 other salaried employees of Trusts (undoubtably including himself) and employers were paying into Pension Trust accounts at other than CBA specified rates, but refused to identify them.

November 30, 1992, or for the imposition of a $200.000.00 bond as a condition of proceeding with the ERISA causes of action.

Moore also argued that there was no basis for the awards of attorneys fees against him, and amassed voluminous evidence to support the allegations in his Complaints and presented it to the court in Declarations filed on July 27 and August 17, 1992, and January 25, 1992.

On appeal Moore asked that the case be remanded to the district court with a decision to permit him to file a Third Amended Complaint without any contingencies related to payment of attorneys fees or posting of bonds.

The appeals court suspended oral argument and a hearing, and dismissed the appeal (in an unpublished opinion) on grounds it did not have juridiction because Moore failed to appeal from the order that he must post a $200,000.00 bond before being permitted to proceed, and rounded that dishonest holding off by begging a "straw man" question that Moore voluntarily dismissed the case. The court of appeals' Memorandum is

at Appendix, pp. 86-91.15/

The appeals court's order failed completely to deal with Moore's appeal, but was confined to regurgitating district court canards that claims were not "meritorious" and raised "vague and conclusory allegations lacking adequate foundations in either fact or law" which "had been litigated in his earlier suits," and which "unreasonably and vexatiously multiplied the proceedings in this matter" (no specifics).

The appeals court said more sanctions were appropriate for those district court acts, and while dismissing for lack of jurisdiction, also exercised jurisdiction by a remand to the lower court for a further award of attorneys fees.

15/. See the final order at Appendix, at 75-7, which clearly shows that there was no voluntary dismissal. The appeals court also cited six cases where the plaintiffs signed stipulations or settlement agreements dismissing the cases as authority for its "straw man" that Moore had voluntarily dismissed this case, and cited to a decision which placed arbitrary conditions on the Supreme Court's holding in *United States v. Procter & Gamble*, 356 U.S. 667, 78 S.Ct. 983 (1958) permitting appeals even from a voluntary dismissal when it is dismissed as a means of expediting review of a party's claim.

ARGUMENT

This petition should be granted because the district court departed from the usual course of proceedings to serve its own nebulous agenda ("a certain abstention doctrine between the courts and the running of labor unions") by refusing to permit Plaintiff to file complaints and sue wrongdoers, and which it also extended to the "running" of ERISA trusts, via decisions which conflict with Supreme Court decisions to permit filing and amending of complaints.

The appellate court has itself overstepped boundaries of accepted procedure by sanctioning such a departure by a lower court, and also did so via decisions which are in conflict with the Supreme Court decisions to permit appeals from final orders of a district court. By taking those actions both courts' departures from the usual course of judicial proceedings merit the exercise of Supreme Court supervision power.

Application of the Supreme Court precedent cited below (and in the district and on appeal) to permit filings of complaints and amend under

F.R.Civ.P. 15 -- and permit the appellate court to exercise jurisdiction over an appeal from the district court's final order -- to the case at hand is clear and unmistakable, and both courts below failed to follow that precedent.

This issue is one of first impression for the Supreme Court and would contribute to the development of national ERISA law and decisions below to prohibit filing of such a complaint do not turn solely on an analysis of facts, or do not depend on the sufficiency of the evidence.

The district court's non-judicial agenda multiplied proceedings in this case just as it had in Case No. 87-0172-B and the appeals court aberrated the collateral order doctrine. The appeals court also unreasonably and vexatiously multiplied proceedings by dishonestly holding the case was voluntarily dismissed, exercised jurisdiction over an appeal it dismissed for lack of jurisdiction, and did so in order to justify remanding the case back to the district court for more awards of attorneys fees for acts in the district court.

The issue of whether officers and unions and contractors' associations abuse their dual roles by appointing themselves as trustees over ERISA Trusts without any input by participants and beneficiaries is a question of federal law which has not been, but should be, decided by the Supreme Court. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).

Trusts participants are comprised of union and non-union CBA third party beneficiaries who are also owed legal duties by Trustees in their dual roles as Union officers and as negotiators and administrators of the CBAs (it is becoming increasingly difficult to enforce those duties in dogmatically recalcitrant federal courts), but who have no direct input into the selection of trustees for union trusts (who are usually union and employers' association sycophants).

But Trusts beneficiaries are, for the most part, spouses and families of CBA beneficiaries who have absolutely no input into tribalistic, arcane, union sub-cultures or the endemically

corrupt administration of their interests in Trusts assets by organizations which absolutely control the economic (and therefore the social) status of their worker/members. The practice of contractors' associations and unions making all trustee appointments to ERISA Trusts (or MEWAs) creates inherent conflict of interest.

Those problems are clearly beyond the academic or the episodic, and because such Trusts comprise the third largest repository of assets in the United States (behind banks and savings and loan institutions) are clearly of interest to the public. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (193); *Rice v. Sioux City Cemetry*, 349 U.S. 70 (1955). The amounts of money involved in resolution of this conflict of interest issue is enormous and many individuals are affected by the decisions below to not permit these issues to be litigated. *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977); *United States v. Zazove*, 334 U.S. 602, 614-14 n.7 (1948) (issues involved billions of dollars);

Patterson v. Lamb, 329 U.S. 539 (1947) (status of many individuals affected by decison below).

There is no doubt the court's repeated denials of motions to amend, and imposition of a $200,000.00 bond and award of attorneys fees against Plaintiff, was *de facto* dismissal. As the Supreme Court has stated:

> [P]etitioner's intention to seek review of both the dismissal and the denial of the motions was manifest.
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> . . .
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> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. at 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). In reversing

a decision that the district court did not abuse its discretion by denying leave to file an amended complaint in that action the Supreme Court held:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d Ed. 1948), [¶¶] 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits.
>
> . . .
>
> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id., 83 S.Ct. at 230.

In *Plasterers Local Union No. 346 v. Wyland Ent., Inc.*, 819 F.2d 217 (9th Cir. 1987) the Ninth Circuit held that Supreme Court approval in *United States v. Proctor & Gamble*, 356 U.S. 667 (1958), of appeals from voluntary dismissal when taken to expedite the appeals applied only when the only other route of appeal is to first

suffer a contempt judgment. That misrepresents the *Proctor & Gamble* holding, where the Supreme Court relied on *Thomsen v. Cayser*, 243 U.S. 66 (1917), and where contempt was never an issue.

As one appellate court stated:

> [T]he judgment below is appealable since appellants solicitation of the formal dismissal was designed only to expedite review of an order which had in fact dismissed appellants' complaint.

Bogorad v. Eli Lilly Co., 768 F.2d 93 (6th Cir 1985); *United States v. Proctor and Gamble*, 356 U.S. 677, 680-681, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) ("plaintiff was only seeking an expeditious review"); *Thomsen v. Cayser*, 243 U.S. 66, 83, 37 S.Ct. 353, 61 L.Ed. 597 (1917) (plaintiffs did not consent to judgment against them, but wanted it to be final in form instead of interlocutory, so that they might appeal without further delay).

Further, an action may not be voluntarily dismissed by a plaintiff under F.R.Civ.P. 41(a)(2) "save upon order of the court and upon such terms and conditions as the court deems proper." *Unioil v. E.F. Hutton & Co., Inc.*,

809 F.2d 548, 554 (9th Cir. 1986) (an order granting a voluntary dismissal does not take effect of its own course and the plaintiff has a reasonable period of time within which either to refuse the conditional voluntary dismissal by withdrawing the motion for dismissal or to accept the dismissal despite the imposition of conditions) (citation omitted).

There was never any stipulation, settlement agreement or F.R.Civ.P. order of the court in the instant case. Courts of Appeals have an obligation to construe complaints most liberally in favor of the Plaintiffs. *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1239 (2d Cir. 1970). (citations omitted)

It is axiomatic that appeals court "lack of jurisdiction" which ordered dismissal (although substantively pretextual and erroneous) also deprived it of jurisdiction to remand the case to the district court for a further award of attorneys fees against Plaintiff.

Dated: 9-19-1994 Lawrence Moore

Lawrence Moore

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EMPLOYEE RETIREMENT INCOME SECURITY ACT,

Title I, § 3 (29 U.S.C. 1002)

DEFINITIONS

Sec. 3. For purposes of this title:

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(14) The term "party in interest" means, as to an employee benefit plan - (C) an employer any of whose employees are covered by such plan.

LABOR MANAGEMENT RELATIONS ACT

Suits By and Against Labor Organizations

(29 U.S.C. 185)

Sec. 301. (a) Suits for violation of contracts between and employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United

States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the

question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Declaration of Findings, Purposes, and Policy

(29 U.S.C. 401)

Sec. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent

investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the

tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

TITLE I - BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS (29 U.S.C. 411)

Sec. 101. (a)(1) Equal Rights. - Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate

in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly. - Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation Fees, and Assessments.

- Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except -

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written

notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the Right To Sue. - No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any

member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards Against Improper Disciplinary Action. - No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written charges; (B) given a reasonable time to prepare his defense; (C) afforded a

full and fair hearing.

TITLE V - SAFEGUARDS FOR LABOR ORGANIZATIONS

Fiduciary Responsibility of Officers of Labor Organizations (29 U.S.C. 501)

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such

organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district

court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more

than $10,000.00 or imprisoned for not more than five years, or both.

TITLE VI - MISCELLANEOUS PROVISIONS

Prohibition on Certain Discipline by Labor Organization (29 USC 529)

Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order Granting in Part and Denying in Part

Defendants' Motions to Dismiss

Filed April 8, 1992

The above captioned matter came on regularly for hearing on April 6, 1992, before the Honorable Rudi M. Brewster. Plaintiff appeared propria persona; Norman R. Allenby, Esq., and Craig Brown, Esq., appeared for Defendant Fischbach & Moore, Inc.; Matthew Kissane, Esq., Melissa Cook, Esq., and Ray Van Der Nat, Esq., appeared for defendants. Upon consideration of the motions and oppositions, it is hereby ordered:

1. The First and Second Causes of Action are dismissed without leave to amend. The plaintiff's right to participate in Union meetings was adjudicated in the prior lawsuit, Civ. No. 87-0172. This court cannot police the speech that takes place or is not allowed at Union meetings. There are no allegations that the defendants' speech was defamatory and or

unprotected by the First Amendment.

2. The Third Cause of Action is dismissed without leave to amend. The acts alleged in it are legal.

3. The Fourth Cause of Action is dismissed without leave to amend. The plaintiff lacks standing to assert a cause of action based upon an alleged inappropriate work tax as alleged in Count One. The facts in Count Two were litigated in the prior law suit. This count is barred by res judicata.

4. The Fifth Cause of Action is dismissed without leave to amend. The facts alleged in this action are barred by the statute of limitations. Labor Management Relations Act, 29 U.S.C. 302. Moreover, the plaintiff does not have the requisite standing to assert this claim.

5. The Sixth Cause of Action is dismissed without leave to amend for all defendants except Archer and Webb. All defendants, excluding Archer and Webb, were defendants in the prior lawsuit. The claim is barred by res

judicata to them. Defendants Archer and Webb were not parties in the earlier suit and the plaintiff has thirty days to amend the lawsuit as to them.

6. The Seventh and Eighth Causes of Action are dismissed with thirty days leave to amend. The plaintiff's allegations in these causes of action are vague, conclusory, and redundant and should be amended to state the facts clearly as to which defendants must respond.

7. The Ninth Cause of Action is preempted by the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1305 which bars pain and suffering claims, and is dismissed.

8. Plaintiff may not receive general or punitive damages and his jury demand on the Seventh and Eighth Causes of Action are stricken. Plaintiff is seeking general damages for "pain, suffering, shame, humiliation and mental anguish." The Ninth Circuit has held that emotional distress damages are not available under ERISA. Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986). Also, punitive

damages may not be sought in ERISA suits. Arizona St. Carpenters Pension Tr. Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991).

Lastly, a breach of fiduciary duty action is "within the exclusive jurisdiction of courts of equity." Local No. 391 v. Terry, 110 S.Ct. 1339, 1346 (1990). Thus plaintiff is not entitled to a jury trial on the Seventh and Eighth Causes of Action.

IT IS SO ORDERED. Dated: April 6, 1992

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order Granting in Part and Denying in Part Defendants' Motions to Dismiss *Nunc Pro Tunc*

Filed April 22, 1992

The above captioned matter came on regularly for hearing on April 6, 1992, before the Honorable Rudi M. Brewster. Plaintiff appeared propria persona; Norman R. Allenby, Esq., and Craig Brown, Esq., appeared for Defendant Fischbach & Moore, Inc.; Matthew Kissane, Esq., Melissa Cook, Esq., and Ray Van Der Nat, Esq., appeared for defendants. Upon consideration of the motions and oppositions, it is hereby ordered:

1. The First and Second Causes of Action are dismissed without leave to amend. The plaintiff's right to participate in Union meetings was adjudicated in the prior lawsuit, Civ. No. 87-0172. This court cannot police the speech that takes place or is not allowed at Union meetings. There are no allegations that the defendants' speech was defamatory and or

unprotected by the First Amendment.

2. The Third Cause of Action is dismissed without leave to amend. The acts alleged in it are legal.

3. The Fourth Cause of Action is dismissed without leave to amend. The plaintiff lacks standing to assert a cause of action based upon an alleged inappropriate work tax as alleged in Count One. The facts in Count Two were litigated in the prior law suit. This count is barred by res judicata.

4. The Fifth Cause of Action is dismissed without leave to amend. The facts alleged in this action are barred by the statute of limitations. Labor Management Relations Act, 29 U.S.C. 302. Moreover, the plaintiff does not have the requisite standing to assert this claim.

5. The Sixth Cause of Action is dismissed without leave to amend for all defendants except Archer and Webb. All defendants, excluding Archer and Webb, were defendants in the prior lawsuit. The claim is barred by res

judicata to them. Defendants Archer and Webb were not parties in the earlier suit and the plaintiff has thirty days to amend the lawsuit as to them.

6. The Seventh and Eighth Causes of Action are dismissed with thirty days leave to amend. The plaintiff's allegations in these causes of action are vague, conclusory, and redundant and should be amended to state the facts clearly as to which defendants must respond.

7. The Ninth Cause of Action is preempted by the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1305 which bars pain and suffering claims, and is dismissed.

8. Plaintiff may not receive general or punitive damages and his jury demand on the Seventh and Eighth Causes of Action are stricken. Plaintiff is seeking general damages for "pain, suffering, shame, humiliation and mental anguish." The Ninth Circuit has held that emotional distress damages are not available under ERISA. Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir. 1986). Also, punitive

damages may not be sought in ERISA suits. Arizona St. Carpenters Pension Tr. Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991).

Furthermore, a breach of fiduciary duty action is "within the exclusive jurisdiction of courts of equity." Local No. 391 v. Terry, 110 S.Ct. 1339, 1346 (1990). Thus plaintiff is not entitled to a jury trial on the Seventh and Eighth Causes of Action.

Lastly, Fischbach & Moore is dismissed from the action. Although it is named as a defendant in the Seventh and Eight Causes of Action, which allege Breach of Trust Agreement and Breach of Fiduciary Duty, Plaintiff cannot state a cause of action against Fischbach & Moore since it was an employer with no fiduciary duty to the Union.

IT IS SO ORDERED. Dated: April 22, 1992

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order denying Plaintiff's motions for reconsideration; denying in part and granting in part Defendants' motion to dismiss; granting Defendants' motion for fees and costs; and staying case until Plaintiff posts a cost bond.

Filed September 10, 1992

The above captioned matter came on regularly for hearing on August 24, 1992, before the Honorable Rudi M. Brewster. Plaintiff appeared in propria persona; Ray Van Der Nat, Esq., Matthew Kissane, Esq. and Melissa Cook, Esq., appeared for defendant Trusts and Trust Directors; Craig Brown, Esq., appeared for Fischbach & Moore. Upon consideration of the Motions, their oppositions and oral argument, the court hereby orders:

1. Plaintiff's Motion to file the "Second Amended Complaint" (which is actually a third amended complaint) is denied. Plaintiff moved to amend further his second amended Complaint to allege that certain union members made

defamatory statements against him. The court finds that the alleged defamatory statements, some of which took place while plaintiff campaigned to be elected Business Manager of the Local, are not defamatory. Causes of action based upon them would not withstand a Motion to dismiss and an amendment based on them would be futile. Futile amendments do not have to be permitted. Lockwood Foundation v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cir. 1991).

Plaintiff also would like to amend his second amended complaint to allege that he was assaulted by an individual named Carl Burns. While plaintiff may be able to state a claim against Mr. Burns, the proposed amendment does not allege anything arising out of the events embraced in the second amended complaint. Therefore, the amendment shall not be permitted.

Plaintiff would also like to attack the validity of Section 1.06 of the Inside Agreement. If the claim was or should have

been adjudicated in a prior lawsuit, the claim is res judicata in this suit. Federated Dept. Stores v. Moitie, 452 U.S. 394 (1981). The plaintiff in this action is also the plaintiff in Case No. 87-0172. In that case, plaintiff unsuccessfully brought suit against Fischbach & Moore. This court has held that § 1.06 entitles the prevailing party, Fischbach & Moore to an award of fees. Plaintiff cannot now attack the validity of § 1.06.

2. Plaintiff's Motion for Reconsideration of the Court's April 8, 1992 order granting defendants' Motions to Dismiss is denied. Plaintiff's filing of the Motion for Reconsideration violates Local Rule 7.1. Plaintiff does not allege any new facts and circumstances, and he filed the Motion for Reconsideration approximately sixty days beyond the thirty day period within which such a motion may be made.

Because the Motion to Reconsider should not have been brought and unreasonably increased the defendants' costs, plaintiff must pay the

attorneys' fees and costs incurred in opposing the Motion. The fees and costs incurred by all respondents to the Motion to Reconsider are to be paid. If the plaintiff and concerned respondents cannot agree as to the appropriate amount of fees or costs, a motion for said determination may be noticed before this Court. However, at that hearing the court will determine which party acted unreasonably and that party will have to pay the fees and costs of such hearing. All causes of action in this lawsuit are stayed until these costs and fees are paid in full.

3. Defendant's Motions to Dismiss as to the Second Amended Complaint are granted with thirty days leave to amend except for the cause of action against various officers of Local 569 who allegedly caused excess pension credit hours to be credited to the accounts of Local 569 employees and agents; however, as to that cause of action, the court orders plaintiff to refile in order to allege with particularity the facts comprising the claim, the names of

the defendants being accused, and to state the years during which the alleged illegal contributions were made. Any such amendment is subject to the required prior compliance with paragraph two hereabove.

4. Pursuant to Fed.R.Civ.P. 11, this lawsuit, including discovery, is stayed as to all Trusts and Trust directors on all causes of action except as to the cause of action asserted against the pertinent officers of Local 569 who caused the alleged excessive pension credits to be sent to the Union Trust on behalf of certain Union agents and employees until plaintiff posts a $200.000 cash or corporate surety bond to be used to pay said defendants' attorneys' fees in the event that plaintiff does not prevail in his claims against the Trusts and Trust directors and officers. The court finds that plaintiff has unreasonably and vexatiously multiplied the proceedings in this matter. In determining that plaintiff has been unreasonable and vexatious, the court considers the fact that

this is the third suit against defendants alleging many of the same violations. The proceedings in each of the cases have been exceedingly voluminous and excessive. The court has also reviewed the complaints in this action twice and questions the merit of the lawsuit against the Trusts. Without this bond, the Trusts' beneficiaries have no assurance that the Trusts will not be jeopardized or bankrupted defending against a lawsuit from which the Trusts are likely to be exonerated. This bond is meant to ensure that the Trusts will be able to recover the costs and fees expended in their defense in the event that they prevail.

IT IS SO ORDERED. DATED: Sep 9, 1992

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order granting Plaintiff's ex parte application for a final order and dismissing case in its entirety

Filed December 21, 1992

The court has received plaintiff's ex parte application for a final order dismissing this case. Plaintiff's ex parte application is granted and this case is dismissed in its entirety with prejudice.

On August 24, 1992 Plaintiff's motions for leave to amend and for reconsideration of previous denial of leave to amend and defendants' motion to dismiss came on regularly for a hearing before the Honorable Rudi M. Brewster. All of plaintiff's motions were denied. Defendants' motion to dismiss the Second Amended Complaint was granted except as to the causes of action against various officers of Local 569 who allegedly caused excess pension credit hours to be credited to be credited to the accounts of Local 569

employees and agents. Plaintiff was also ordered to pay defendants' attorney fees incurred to oppose the motion to reconsider. Finally, the court stayed all aspects of this lawsuit pursuant to Fed.R.Civ.P. 11 as to all defendants except as to the cause of action asserted against the pertinent officers of Local 569 who caused the alleged excessive pension credits to be sent to the Union Trust on behalf of certain Union agents. Plaintiff would only be allowed to proceed with this lawsuit if he posted a $200,000 cash or corporate surety bond to be used to pay said defendants' attorney fees in the event that plaintiff did not prevail in his claims against the Trusts and Trust directors and officers.

Plaintiff has communicated to this court that he is unable to post $200,000 in cash or as a corporate surety bond as required by the August 24, 1992 order in order to proceed with this action. The parties have been unsuccessful in attempts to agree on the amounts of the attorney fees for opposing

plaintiff's motion to reconsider. Plaintiff has made it known to the court that he is unable to pay any amount for attorneys fees that may be awarded.

Because plaintiff has stated that he is unable to post the necessary bond before this court is willing to permit plaintiff to pursue this lawsuit and because he has stated that he is unable to pay any amount of attorneys fees to defendants, plaintiff's ex parte application for a final order is granted and this case is dismissed in its entirety.

IT IS SO ORDERED. DATED: DEC 18, 1992

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order granting attorney fees and costs for $2201.00 to Defendant Fischbach & Moore

Filed January 15, 1993

The motion for attorney fees noticed by defendant Fischbach & Moore before the Honorable Rudi M. Brewster for January 11, 1993 was considered by court on the motion papers and the record. No oral argument was heard. Plaintiff Fischbach & Moore's motion for reasonable attorney fees and costs is granted in the amount of $2201.00.

1. In the order filed September 10, 1992, the court awarded reasonable attorney fees to defendants for opposing plaintiff's motion for reconsideration. The parties were directed to meet and confer regarding the amount of reasonable attorney fees. However, in the event that the parties were unable to reach agreement, the parties were to notice a hearing before this court regarding the fee matter. At that time, the court would not only determine

reasonable attorney fees and costs, but also award fees and costs for bringing the attorney fee motion before this court to the party that acted more reasonably during fee negotiations.

2. During the fee negotiations between Mr. Moore and counsel for Fischbach & Moore, Craig Brown, Brown reduced his request for fees twice and properly excluded from the fee request all time spent on matters other than the motion for reconsideration, such as time spent on the motion to amend. The court finds Fischbach & Moore's fee request for opposing plaintiff's August 24, 1992 motion for reconsideration and its actions during the negotiations reasonable.

3. The court finds plaintiff's offer of $275 in response to Fischbach's request and his later failure to appear before Magistrate McCue for a hearing on this matter unreasonable.

4. Accordingly, defendant Fischbach & Moore's request for attorney fees spent on opposing plaintiff's motion for reconsideration is granted in the amount of $1,276 (11.6 hours). This amount takes into account an

adjustment by court of defendant's request by $66.00 since it appears from the motion papers and in particular the Declaration by Mr. Brown that a $66.00 entry for 8/4/1992 appeared twice. See Declaration of Craig A. Brown in support of Motion to Determine Reasonable Attorneys' Fees at 6-7.

5. Furthermore, the court finds that Fischbach & Moore's fee request and actions during the negotiations was more reasonable than Mr. Moore's offer and actions. Fischbach & Moore is granted $800.00 (6.4 hours) attorney fees and costs for bringing this motion.

6. Fischbach & Moore is also awarded $125 for its time spent in its effort to resolve this matter before Judge McCue.

7. Fischbach & Moore's request for fees and costs for time spent negotiating with Mr. Moore and drafting billing time summaries is not proper under the September 10, 1992 order.

8. Fischbach & Moore is awarded a total sum of $2,201.00.

IT IS SO ORDERED. DATED: JAN 12, 1993

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order remanding determination of attorney fees to Magistrate Judge; and denying motion for reconsideration of Final Order

Filed February 12, 1993

The Motion for Determination of Reasonable Attorney Fees and for Reconsideration of the Final Order noticed by defendants IBEW Local 569, the Union Trusts, and employees before the Honorable Rudi M. Brewster for February 8, 1993 was considered by the court on the motion papers and the record. No oral argument was heard. Defendants' motion for a determination of reasonable attorney fees and costs is remanded to the Magistrate Judge. Defendants' Motion for Reconsideration of the Final Order, entered December 22, 1992, is denied.

There are conflicting declarations by the parties in regard to whether plaintiff Moore was properly noticed of the attorney fees determination hearing before Magistrate Judge

McCue. The attorney fees motion is remanded to Judge McCue for a determination of which party acted less reasonably in this context and what amount of attorney fees and costs should be awarded to defendants in accordance with the September 9, 1992 order of this court.

Defendants' motion for reconsideration of the Final Order, entered December 22, 1992, is denied. Defendants did not file their motion until January 11, 1993, more than 10 days after judgment in this case was entered and after plaintiff filed his notice of appeal. It is therefore untimely.

IT IS SO ORDERED. DATED: FEB 14, 1993

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

[Magistrate Judge's] Order on matter of reasonableness of attorneys fees

Filed April 27, 1993

This matter came on for hearing on April 5, 1993. Based on the pleadings, memoranda, declarations and oral argument of counsel, this Court determined that:

1. The efforts of the Defendants' attorneys in defending against Plaintiff's "Motion to Reconsider" were recognized by Judge Brewster as being worthy of a cost and fee award.

2. The amount of the award is governed by the Rule of Reason. The United States Courts are not concerned with time actually spent on a matter but rather with time reasonably expended.

3. The actual hours billed by defense counsel here are excessive. It was only necessary to remind the court of its prior ruling. More than that was not reasonably

required.

4. Plaintiff must pay for time spent by defense counsel in attending a hearing that was not held.

This Court, therefore, concludes that the Plaintiff will be in compliance with Judge Brewster's order denying the Motion to Reconsider and awarding fees and costs to the defendants by tendering the sum of One Thousand and Five dollars ($1,005.00) plus an additional Two Hundred and Fifty dollars ($250.00) for not appearing at the November 30, 1992 hearing. This award is intended to satisfy the claims of all defense counsel and the matter of apportionment is left to them.

IT IS SO ORDERED this 14th day of April, 1993

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order

Filed June 16, 1993

Upon consideration of defendant Fischbach & Moore's ex parte Application for Clarification of the February 12, 1993 Order, the Application is granted. The February 12, 1993 Order remanded the issue of attorney fees to Magistrate Judge McCue only as to Union and the Trust Defendants. Defendant Fischbach & Moore's attorney fee request was already determined by this Court's January 15, 1993 Order. Therefore, Judge McCue's orders determining attorney fees following the remand do not apply to Fischbach & Moore.

Fischbach & Moore's further request for attorney fees is denied.

IT IS SO ORDERED. DATED: JUN 15, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE, *Plaintiff-Appellant,*	
v.	
LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; SAN DIEGO ELECTRICAL PENSION TRUST; JOE HEISLER, et al.; TOM PRIDEMORE, *Defendants-Appellees.*	C.A. No. 93-55287 D.C. No. CV-91-1543-RMB MEMORANDUM*

Appeal from the United States District Court for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Submitted June 10, 1994**
Pasadena, California

Before: FARRIS, O'SCANNLAIN, and TROTT, Circuit Judges.

Lawrence Moore contends the district court erred in (1) dismissing without leave to amend the remainder of his First Amended Complaint;

* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** The panel finds this case appropriate for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

(2) requiring him to pay the defendants' attorneys' fees incurred in opposing Moore's motion for reconsideration before proceeding any further with his remaining causes of action; and (3) requiring him to post a $200,000 bond before proceeding any further with his causes of action against the Trust Funds. We dismiss the appeal.

I.

In general, a plaintiff may not appeal a voluntary dismissal. Wickland Oil Terminal v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986), cert. denied, 484 U.S. 822 (1987); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548 (9th Cir. 1986); Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986) (per curiam). An exception to this general rule arises when a district court grants a voluntary dismissal as a means of expediting the review of a party's claim. United States v. Procter & Gamble, 356 U.S. 677, 680-81 (1958); Thomsen v. Cayser, 243 U.S. 66, 83 (1917). This exception "applies only if

'the only other route is a contempt judgment, and by taking a dismissal and appealing, the appellant avoids unseemly conflict with the District court over the contempt issue.'" Plasterers Local Union No. 346 v. Wyland Ent., Inc., 819 F.2d 217, 218 (9th Cir. 1987) (quoting 2 Federal Procedure, Lawyers Edition § 3:315 (1981)).

Because another route of appeal was available, we lack jurisdiction over Moore's appeal from the voluntary dismissal order. The district court's order of September 10, 1992 was immediately appealable as a collateral order because it (1) conclusively determined that a bond was required before the matter could proceed; (2) resolved an important issue separate from the merits; and (3) was effectively unreviewable on appeal from the final judgment because Moore claims he could not afford to post the bond. Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1114 (9th Cir. 1990). Moore failed to file a notice of appeal within 30 days of

September 10, 1992. Fed. R. App. P. 4. His appeal is dismissed.

II.

Pursuant to Section 502(g) of ERISA, the Trust Funds seek to recover the attorneys' fees they incurred in opposing this appeal. 29 U.S.C. § 1132(g). In determining whether attorneys' fees should be awarded to a party in an ERISA suit, we consider:

> (1) The degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting the fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980); see also Sokol v. Bernstein, 812 F.2d 559, 560 (9th Cir. 1987) (applying Hummell to determine whether attorneys' fees should be awarded on appeal).

We usually are reluctant to award

attorneys' fees against an ERISA plaintiff for fear of chilling meritorious claims. In Sokol, we noted that the Hummell "criteria often suggest that attorneys' fees should not be awarded against ERISA plaintiffs." 812 F.2d at 560. However, aside from Moore's limited ability to satisfy a fee award, the remaining factors favor granting the Trust Funds' request.

Moore filed complaints against the Trust funds that raised vague and conclusory allegations lacking in either fact or law. Cf. West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1526-28 (9th Cir. 1990). His complaints repeated allegations that had been litigated in his earlier suits. Nothing in the record suggests that further opportunities to amend would have solved these problems. Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 772 (9th Cir. 1991). In addition, the court found that Moore had "unreasonably and vexatiously multiplied the proceedings in this matter."

On this record sanctions are appropriate. The purpose of ERISA is to protect the beneficiaries of pension plans. Sokol, 812 F.2d at 560. This purpose is not served by allowing employee trust funds to be depleted in the defense of unreasonable and vexatious claims.

Although the district court required Moore to post a $1000 bond to cover the defendants' court costs, it did not make findings as to attorneys' fees. We remand for the limited purpose of allowing the district court to determine an appropriate attorneys' fee award for the Trust Funds. Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970).

DISMISSED and REMANDED for an award of attorneys' fees.

Supreme Court, U.S.
FILED
OCT 19 1994
OFFICE OF THE CLERK

(2)

CASE NO. 94-556

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PLAINTIFF/PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; SAN DIEGO ELECTRICAL PENSION TRUST; SAN DIEGO NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK; RON COOPER; JOE MANSOLILLO, ET AL.

DEFENDANTS/RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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30 pp

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Ninth Circuit Court of Appeals acted properly in dismissing an appeal by an appellant who voluntarily dismissed his case at the district court level and in concluding that the appeal was untimely due to the appellant's failure to file a notice of appeal within thirty (30) days of an order by the district court requiring appellant to post a $200,000.00 bond before permitting appellant to proceed further against appellees.

B. Whether the Ninth Circuit Court of Appeals acted properly in dismissing an appeal for lack of jurisdiction while awarding appellees their attorneys' fees incurred on appeal under Section 502(g) of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1132(g).

LIST OF ALL PARTIES

Plaintiff/Appellant/Petitioner, LAWRENCE MOORE, and Defendants/Appellees/Respondents INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, SAN DIEGO ELECTRICAL PENSION TRUST, SAN DIEGO ELECTRICAL HEALTH AND WELFARE TRUST, SAN DIEGO ELECTRICAL TRAINING TRUST, SAN DIEGO ELECTRICAL INDUSTRY EDUCATION AND MANPOWER DEVELOPMENT TRUST, LABOR MANAGEMENT COOPERATIVE FUND, SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, TOM PRIDEMORE, PAUL BLACKWOOD, WAYNE LOVIN, JIM WESTFALL, WILMER BASS, DICK SMITH, TERRY GODSHALK, JOE HEISLER, GEORGE ENGLAND, RAY ALTMEYER, JOHN SIMPSON, JIM ALYSWORTH, CHARLES WILDER, RON COOPER, DAVID ALLISON, KENNETH STUART, DAVID RASPOLICH, WAYNE VAN DER LINDEN, JACK ZWART, JIM ARCHER, GREG WEBB, MIKE SPARKS, JOE MANSOLILLO, J.J. BARRY, S.R. McCANN, DICK ROBBINS, and FISCHBACH & MOORE, INC.

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CITATIONS TO OPINIONS BELOW

Memorandum entered by the United States Court of Appeals for the Ninth Circuit, C.A. No. 93-55287, on June 27, 1994. (Petitioner's Appendix, p. 86.)

STATEMENT OF JURISDICTIONAL GROUNDS

The Memorandum of the Court of Appeals was filed on June 27, 1994. Jurisdiction was proper in the United States District Court under 28 U.S.C. §1331 29 U.S.C. §412, and 29 U.S.C. §1132, et seq. Appellate jurisdiction was proper under 28 U.S.C. §1291. This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. §1254(1).

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STATEMENT OF THE CASE

Petitioner LAWRENCE MOORE, in his ongoing attempt to remedy the wrongs allegedly perpetrated against him by the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 569, the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, and various officers of those entities (hereafter collectively referred to as the "UNION DEFENDANTS"), filed an action not only against the UNION DEFENDANTS, but also against the multi-employer trust funds which administer the pension, health and training benefits for the members of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 569 ("IBEW LOCAL 569").[1]

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[1] This brief is filed on behalf of INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569, SAN DIEGO ELECTRICAL PENSION TRUST, SAN DIEGO ELECTRICAL HEALTH AND WELFARE TRUST, SAN DIEGO ELECTRICAL TRAINING TRUST, SAN DIEGO ELECTRICAL INDUSTRY EDUCATION AND MANPOWER DEVELOPMENT TRUST, LABOR MANAGEMENT COOPERATIVE FUND, SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, TOM PRIDEMORE, PAUL BLACKWOOD, WAYNE LOVIN, JIM

In the instant case, MOORE filed suit against some thirty defendants, including the following entities: IBEW LOCAL 569, a local labor union and its officers and employees; the SAN DIEGO ELECTRICAL PENSION TRUST, SAN DIEGO ELECTRICAL HEALTH AND WELFARE TRUST, and the SAN DIEGO ELECTRICAL TRAINING TRUST, (hereinafter collectively referred to as the "TRUSTS"); the SAN DIEGO ELECTRICAL INDUSTRY EDUCATION AND MANPOWER DEVELOPMENT TRUST ("DEVELOPMENT TRUST") and the LABOR-MANAGEMENT COOPERATIVE FUND ("LMCF"); current and former trustees of the TRUSTS ("TRUSTEES"); current and former administrators of the TRUSTS; the SAN DIEGO CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ("NECA") a multi-employer association and its current and

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WESTFALL, WILMER BASS, DICK SMITH, TERRY GODSHALK, JOE HEISLER, GEORGE ENGLAND, RAY ALTMEYER, JOHN SIMPSON, JIM ALYSWORTH, CHARLES WILDER, RON COOPER, DAVID ALLISON, KENNETH STUART, DAVID RASPOLICH, WAYNE VAN DER LINDEN, JACK ZWART, JIM ARCHER, GREG WEBB, MIKE SPARKS, and JOE MANSOLILLO.

former manager. This brief is filed on behalf of the TRUSTS, their TRUSTEES and administrators, DEVELOPMENT TRUST, LMCF, as well as NECA and its managers (hereinafter collectively referred to as the "TRUST DEFENDANTS").

On October 28, 1991, MOORE filed his original Complaint in this action, which named only the UNION DEFENDANTS and various union officers as parties to the action. Before the Complaint was served, MOORE filed an Amended Complaint on January 24, 1992, whereby the TRUST DEFENDANTS were added to the Complaint as named defendants for alleged violations of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1001, et seq.

In response to the Amended Complaint, UNION DEFENDANTS and TRUST DEFENDANTS filed a Motion to Dismiss, Motion for a More Definite Statement, and Motion to Strike portions of MOORE's Amended Complaint. Pursuant to the Court's Order Nunc Pro Tunc dated April 22,

1992, the District Court dismissed MOORE's allegations against the UNION DEFENDANTS without leave to amend and dismissed the ERISA claims under ERISA against the TRUST DEFENDANTS with leave to amend, ruling that MOORE's allegations were conclusory, vague and failed to state a valid claim against the TRUST DEFENDANTS. The Court allowed the Sixth cause of action to remain intact only as to two individual union agents, GREG WEBB and JAMES ARCHER, who had not been named in MOORE's previous actions. MOORE's request for a jury trial on the ERISA claims was stricken, as were his claims for general and punitive damages.

On May 20, 1992, MOORE filed his Second Amended Complaint which alleged similar labor law violations and breaches of the TRUST DEFENDANTS' fiduciary duties under ERISA. However, allegations regarding the violations of ERISA in MOORE's Second Amended Complaint were virtually identical to the allegations

previously deemed inadequate by the Court in ruling on Defendants' Motion to Dismiss MOORE's First Amended Complaint.

The UNION and TRUST DEFENDANTS filed a Motion to Dismiss, Motion for a More Definite Statement and Request for Sanctions in response to MOORE's Second Amended Complaint.

On July 27, 1992, before the scheduled hearing on UNION and TRUST DEFENDANTS' Motions to Dismiss MOORE's Second Amended Complaint, MOORE filed a Motion to Reconsider the Court's dismissal of his First Amended Complaint and Motion to Amend, along with a new proposed Second Amended Complaint (actually MOORE's third amended complaint). UNION DEFENDANTS and TRUST DEFENDANTS opposed MOORE's motions to reconsider and to amend on the grounds that MOORE's motions were untimely and improper. The court found at the hearing that MOORE's motion for reconsideration was not timely filed and that it did not contain any new or additional facts relative to the causes of

action which the court had given MOORE leave to amend. The court noted that the evidence MOORE offered as new was "just a regurgitation of the arguments that were previously made." Additionally, the court denied MOORE's Motion for leave to file a Second Amended Complaint (actually his third amended complaint), characterizing the proposed amended complaint as "extremely vague and incomprehensible, and would be clearly subject to motions to dismiss, or at least motions for a more definite statement." In ruling on UNION and TRUST DEFENDANTS' Motion to Dismiss MOORE's Second Amended Complaint, the Court found the causes of action against the TRUST DEFENDANTS to be "totally conclusory and ambiguous and incomprehensible."

Following the hearing, the Court entered an Order on September 10, 1992, denying MOORE's Motion for Reconsideration; denying MOORE's Motion to Amend his Complaint in accordance with his proposed Second Amended

Complaint (actually third amended complaint); granted UNION DEFENDANTS' and TRUST DEFENDANTS' Motion to Dismiss the Second Amended Complaint with leave to amend conditioned upon MOORE posting a cash or corporate surety bond in the amount of $200,000.00 in favor of the TRUST DEFENDANTS; stayed all further court proceedings and discovery as to the TRUST DEFENDANTS until MOORE posted a $200,000.00 cash or corporate surety bond; ordered MOORE to pay the reasonable attorneys' fees UNION and TRUST DEFENDANTS incurred for having to oppose MOORE's untimely and baseless Motion to Reconsider; and, stayed all remaining causes of action in MOORE's lawsuit until the attorneys' fees were paid by MOORE. (Petitioner's Appendix p. 8.)

Several months later, MOORE filed a further motion for leave to amend his complaint and a proposed seventy (70) page Third Amended Complaint (actually MOORE's

fourth amended complaint) without complying with the bond requirement or paying Defendants' attorneys' fees. The court denied MOORE's motion for leave to amend his complaint sua sponte because MOORE had not posted the bond or paid the attorneys' fees and was therefore, in violation of the court order.

Concurrently with the filing of his Motion for Leave to Amend his Complaint, MOORE filed an Application for Final Order, wherein he requested a dismissal of his action in its entirety.[2] MOORE subsequently filed a Notice of Motion and Ex Parte Application for Final Order along with a Declaration in Support of Application for Final Order. The Court

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[2] MOORE did not ask the court to dismiss the action with prejudice. He requested only that the action be dismissed in its entirety. Defendants were given no indication that MOORE wanted the action dismissed with prejudice for the purposes of appeal. The court sua sponte dismissed the case with prejudice.

granted MOORE's request to dismiss his own case on December 21, 1992, and entered a Final Judgment dismissing the case with prejudice. (Petitioner's Appendix, p. 65.)

On April 27, 1993, the Court granted UNION and TRUST DEFENDANTS' Motion to Determine Reasonable Attorneys' Fees and ordered MOORE to pay them the sum of $1,255.00 as reasonable attorneys' fees incurred by the UNION and TRUST DEFENDANTS in opposing MOORE's Motion to Reconsider pursuant to the September 10, 1992 order.

On January 4, 1993, MOORE filed a Notice of Appeal. Moore has previously indicated that the only issue in his appeal is whether he should be permitted to continue to prosecute his action without having to comply with the Court's order that he post a $200,000.00 bond and satisfy the Court's interlocutory award of attorney's fees.

The Ninth Circuit agreed with the TRUST DEFENDANTS' position and dismissed MOORE's

appeal as untimely, holding that MOORE should have filed a notice of appeal within thirty (30) days after the Court's order dismissing his Second Amended Complaint and requiring him to post a $200,000.00 bond before proceeding. The Court further found that MOORE is not entitled to appeal the dismissal of his case with prejudice because he voluntarily sought the dismissal. (Petitioner's Appendix, p. 86.)

Finally, the Court of Appeals affirmed the District Court's holding that his claims against the TRUST DEFENDANTS were "vague and conclusionary allegations lacking adequate foundation in either fact or law" which "unreasonably and vexatiously multiplied the proceedings in this matter." Accordingly, the Court ruled that the TRUST DEFENDANTS had satisfied the criteria of Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980) and awarded the TRUST DEFENDANTS their attorneys' fees incurred on appeal. The Court

of Appeals also remanded the decision as to the amount of attorneys' fees that should be awarded to TRUST DEFENDANTS to the district court. (Petitioner's Appendix, p. 86.)

ARGUMENT

A. The Court of Appeals Correctly Dismissed MOORE's Appeal by Refusing to Allow Him to Appeal the Dismissal of His Case Because He Voluntarily Requested a Final Order Dismissing the Case in Its Entirety.

The general rule is that a plaintiff may not appeal his own request for a dismissal of an action that he commenced. Evans v. Phillips, 4 Wheat. 73 (1819); United States v. Babbit, 104 U.S. 767 (1881). The Ninth Circuit held in Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986), "[a] plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him." The court elaborated by holding, "having agreed to dismiss this action with prejudice, [the appellant] deprived this court of jurisdiction to consider his appeal." Id.

MOORE, himself, sought the dismissal of his case by filing an Application for Final Order. It is noteworthy that MOORE did not seek a dismissal with prejudice in his application. However, in granting MOORE's request for a final order, the court sua sponte dismissed MOORE's action with prejudice. It is now obvious that MOORE's sole purpose in applying for a final order was solely to resurrect the appeal period, since MOORE had previously allowed the period within which to file a notice of appeal upon the court's order requiring the posting of the bond to expire.

The Court granted MOORE's Application for Final Order on December 21, 1992, thereby dismissing his action with prejudice. The Defendants were led to believe a hearing was to be held on MOORE's request for a final order and his Third Amended Complaint on January 25, 1993, as noticed on MOORE's original Application for a Final Order.

However, the court ruled on MOORE's Application without hearing from Defendants because they received no notice from the court or from MOORE regarding the arbitrary removal of the January 25, 1993 hearing from the calendar. As a result, MOORE's action was dismissed without opposition from the UNION and TRUST DEFENDANTS, which would have demonstrated to the Court MOORE's true motivation in seeking a "final" order.

Only one exception exists for a plaintiff who voluntarily requests a dismissal to then appeal that dismissal.

> "As a general rule, neither party may appeal from an agreed judgment because it is not an involuntary adverse judgment. There is an exception, however, when the appellant's solicitation of the formal dismissal was designed only to expedite review of [a prior] order which had in effect dismissed appellant's complaint." Laczay v. Ross Adhesives, 855 F.2d 351, 351 (6th Cir. 1988), cert. denied, 489 U.S. 1014 (1990).

In order to qualify for this exception, the plaintiff must inform the court and the

opposing parties that he is seeking the dismissal in order to obtain appellate review of a prior order.

> "[Plaintiff] then had the responsibility to inform the court and opposing parties that he was seeking a final order of dismissal with prejudice for the sole purpose of obtaining an expeditious review of the prior order, and of reserving that right unequivocally in the stipulation or the order. Having done none of those things, the plaintiff did not preserve a right of appeal." Id. at 355.

The court in Laczay also held that before a plaintiff can appeal his own request for dismissal, he must have lost the case on its merits. "The basic requirement for appealability of a consent judgment is that the one proposing or soliciting it shall have lost on the merits and be only seeking an expeditious review. [Citation omitted.]" Id. (Emphasis added.)

MOORE has not met either of these requirements. He did not indicate his intent to appeal following the dismissal in any of

the many documents he filed requesting the final order. MOORE's proposed Final Order, his Declaration in Support of Application for Final Order and his Ex Parte Application for Final Order contain no mention of his desire to expedite an appeal.

In addition, MOORE did not lose on the merits of his case. As evidenced by the record, MOORE was never able to file a proper complaint in this action. Therefore, the merits were never reached by the court. The final judgment was granted solely because MOORE indicated he was unable to comply with the requirement that he post a $200,000.00 bond, as required under the court's order of September 10, 1992, not because he lost on the merits.

Because MOORE did not inform the court or the opposing parties of his desire to expedite an appeal and he did not lose his case on the merits, MOORE has failed to satisfy the requirements for the exception to the rule

that a plaintiff may not appeal his own voluntary request for a dismissal. Accordingly, the Court of Appeals properly concluded that it lacked jurisdiction to consider this appeal and therefore dismissed MOORE's appeal, holding that another avenue of appeal was available to MOORE; i.e. his right to appeal the order requiring him to post a bond.

B. **The Appellate Court Correctly Held that MOORE'S Failure to Timely File His Notice of Appeal Following Entry of the Order Requiring Him to Post the $200,000.00 Bond Constituted a Waiver of His Right to Appeal.**

The Order entered by the district court on September 10, 1992, which required MOORE to post a $200,000.00 cash or corporate surety bond, effectively ended MOORE's ability to proceed in this case. His failure to file a notice of appeal within the thirty day period following the entry of that order constitutes a waiver of his appeal rights in this case. The Court of Appeals agreed with the TRUST DEFENDANTS' position and determined that this

Order was immediately appealable as a collateral order under Riverhead Savings Bank v. National Mortgage Equity, Co., 893 F.2d 1109, 1114 (9th Cir. 1990) because it:

> "(1) conclusively determined that a bond was required before the matter could proceed; (2) resolved an important issue separate from the merits; and (3) was effectively unreviewable on appeal from the final judgment because Moore claims he could not afford to post the bond." Memorandum, Ninth Circuit Court of Appeals, Case No. 93-55287, June 27, 1994. (Petitioner's Appendix, p. 88.)

MOORE should have appealed the Court's order that effectively dismissed the action within the thirty day limit. The Court correctly found that his failure to exercise his right to appeal the order imposing the bond within the requisite time period constitutes a waiver by MOORE of his right to appeal. Accordingly, the Court of Appeals concluded that it lacked jurisdiction to review the matters raised by MOORE's Appeal.

C. The Court of Appeals Properly Exercised Jurisdiction By Sanctioning MOORE's Conduct and Awarding TRUST DEFENDANTS Their Attorneys' Fees Incurred on Appeal.

MOORE argues that the Ninth Circuit's holding that it lacks jurisdiction to review the merits of his appeal, prohibits the Court from exercising jurisdiction to award TRUST DEFENDANTS their attorneys' fees incurred on appeal. Contrary to MOORE'S assertion, the Ninth Circuit has inherent discretion to award such attorneys' fees, even if it lacks jurisdiction to review an appeal. The Ninth Circuit awarded attorneys' fees against MOORE as sanctions for his "unreasonable and vexatious claims" against the TRUST FUNDS. (Petitioner's Appendix, p. 91)

In a case similar to the case at bar, Trohimovich v. C.I.R, 776 F.2d 873 (9th Cir. 1985), the Ninth Circuit Court of Appeals explained that an appellate court has the power to award sanctions when the appeal is dismissed for lack of jurisdiction. In that

case, the Ninth Circuit did not have jurisdiction over the appeal because the appellants filed their notice of appeal one hundred and thirty-four days after the United States Tax Court denied appellants' claim for relief: forty-four days beyond the ninety day time period for filing the appeal. Although the Ninth Circuit concluded in Trohimovich that it did not have jurisdiction to review the merits of the appeal, the court found it did have independent jurisdiction to impose sanctions against the appellant for abusive conduct. 776 F.2d at 875.

> "Our inherent jurisdiction to condemn and punish the abusive conduct of litigants and their attorneys who appear before us is separate and apart from our jurisdiction to adjudicate the merits of their claims. In the exercise of our inherent jurisdiction we may of course, inform ourselves of the nature and extent of apparent misconduct and we may condemn it as abusive. Our condemnation is not the exercise of our jurisdiction over the merits; it is an exercise of our inherent jurisdiction." Id.

Accordingly, MOORE'S unsupported contention that the Ninth Circuit cannot impose sanctions because the Court otherwise lacks jurisdiction to consider his untimely appeal is directly contrary to established law. Accordingly, the Ninth Circuit appropriately sanctioned MOORE'S frivolous and vexatious conduct by awarding the TRUST DEFENDANTS their reasonable attorney's fees incurred on appeal under Section 502(g) of ERISA, 29 U.S.C. §1132(g).

CONCLUSION

For each of the foregoing reasons, Respondents TRUST DEFENDANTS respectfully request that the court deny Petitioner's Petition for Writ of Certiorari.

DATE: 10/17/94 STRAUSS, KISSANE & COOK

By: _____
MATTHEW T. KISSANE,
Attorneys for Respondents

APPENDIX

Page

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, Section 502, 29 U.S.C. §1132 23

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Sec. 502. (a) A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan;

. . .

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a).

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the

breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) the district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (1) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph (2)), by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.